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Citation: 2022 FPSLREB 97

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

LINDA TASSILE

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Tassile v. Treasury Board (Department of National Defence)

In the matter of individual grievances referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Anne Julie Couture, counsel

For the Employer: Mathieu Cloutier, counsel

Heard via videoconference,
October 18 and 19, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. The grievor's motion

[1] Linda Tassile ("the grievor") filed several grievances against the employer and referred them to adjudication before the Federal Public Sector Labour Relations and Employment Board ("the Board"). She worked at the Department of National Defence. Although the legal employer is the Treasury Board, for the purposes of this decision, this department is deemed the employer as the Treasury Board delegated human resources management responsibility to it. The grievor's bargaining agent, the Public Service Alliance of Canada, represented her with respect to the grievances.

[2] The grievance hearing was scheduled to begin on October 17, 2022. On October 7, 2022, the grievor made a motion that the decision and the file be anonymized, specifically that the style of cause be anonymized and that any personal information be redacted from the exhibits and the file that could allow identifying her. She asked that the motion proceed during the week that was scheduled to hear the grievances.

[3] The employer objected to the late request, but I allowed it. I agree with the grievor that it is best to decide in advance whether a file should be anonymized. Otherwise, if granted, the anonymization would lose some of its effect. Therefore, I heard the motion, which this decision is limited to. The hearing on the merits will proceed at a later date.

[4] For the following reasons, the anonymization motion is denied. Options are available that infringe less on the Board's open court principle to ensure the confidentiality of information that could constitute a breach of an important public interest if disclosed, namely, the grievor's dignity.

II. Summary of the evidence

[5] The grievor testified about the difficult circumstances that her diagnosis created. In view of my decision and of how I intend to treat any medical information that could be disclosed at the hearing, I do not intend to comment further on the grievor's diagnosis.

[6] The grievor also stated in her testimony that publishing her name would cause her considerable distress because, for the moment, few people are aware of the circumstances surrounding her grievances.

[7] Without the protection of anonymity, the grievor stated that she would not be able to disclose everything she is experiencing in terms of medical or psychological difficulties. She is also concerned that certain decisions about her made by a different administrative tribunal, which are anonymous for the moment, would cease to be so because, in her opinion, the public could link a Board decision to that other administrative tribunal's decisions. She added that disclosing the details of her state of health could also hinder her employment opportunities.

III. Summary of the arguments

[8] The parties agreed that my decision had to be guided by the latest Supreme Court of Canada decision on the open court principle in *Sherman Estate v. Donovan*, 2021 SCC 25, which reiterates the main points developed in landmark decisions (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41) but also stresses the concept of dignity, which is central to this case.

[9] In the following paragraphs, I outline the main points from *Sherman* to give context to the parties' arguments and a framework for the analysis that follows.

[10] *Sherman* addresses the disclosure of information in the context of the homicides of two well-known personalities, Bernard and Honey Sherman. Their deaths continue to be the subject of an ongoing police investigation, and the tragic circumstances garnered significant media attention. The estate's trustees asked that the estate probate files be sealed, to protect the interests of privacy and physical safety. The Supreme Court found that the trustees did not establish that a serious risk existed to an important public interest. However, the Supreme Court commented on dignity as potentially being an important public interest.

[11] The Supreme Court reformulated the criteria to allow a confidentiality-order request based on these three prerequisites:

…

> *[38] … In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:*
>
> *(1) court openness poses a serious risk to an important public interest;*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,*
>
> *(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*
>
> …

[12] However, although it affirmed the Ontario Court of Appeal's decision to refuse to seal the estate's probate files, the Supreme Court distinguished its decision from that of the Court of Appeal, which had indicated that personal privacy concerns cannot constitute a public interest that would justify the measure being sought. The parties before the Supreme Court held opposing views on whether privacy could constitute a public interest.

[13] The Supreme Court answered the question as follows:

> …
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> *[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from* Sierra Club [reference omitted]. *Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.*
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> …
>
> *[34] … This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.*
>
> …

[14] It is important to note that the Supreme Court distinguished between dignity and privacy. It stated the following at paragraph 52:

> *[52] … It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.*

[15] The Supreme Court then explained that "… the right to privacy, however defined, in some measure gives way to the open court ideal" (at paragraph 58). It added this to that paragraph: "I share the view that the open court principle presumes that this limit on the right to privacy is justified."

[16] The Supreme Court also took care to state that protecting dignity is an important interest that should be considered as being seriously threatened only in limited cases (at paragraph 63). In that same paragraph, the following can be read: "Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness …".

[17] The Supreme Court clarified what it meant by dignity as an important public interest in the following terms:

> …
>
> *[71] … Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner* [references omitted]. *Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public.…*
>
> …

A. For the grievor

[18] The grievor submitted that anonymization is essential, to safeguard her dignity as the Supreme Court understood it in *Sherman*. The hearing will deal with sensitive facts, and their general disclosure risks causing her real psychological harm.

[19] She presented other examples of jurisprudence in which courts chose to anonymize decisions to prevent a breach of privacy: *A.B. v. Bragg Communications Inc.*, 2012 SCC 46; *J.L.D. v. Vallée*, 1996 CanLII 5846 (QC CA); *9008-4062 Québec Inc. v. Travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 502,*

TUAC (C.D.), 2009 CanLII 94157 (QC SAT); *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629 ("*A.B.*"); and *S. v. Lamontagne*, 2020 QCCA 663. I will return to this in my analysis.

[20] The grievor also raised the principle of the proper administration of justice and submitted that a contradiction between two administrative tribunals would arise were the decision not anonymized. In fact, the other administrative tribunal's decisions about her are anonymous, and according to her, those anonymous decisions and the Board's decision could be connected, which would cancel the anonymization decided by the other administrative tribunal. To support that argument, she submitted a recent Board decision, *N.L. v. Treasury Board (Department of National Defence)*, 2022 FPSLREB 82, in which the Board allowed an anonymization request. I will return to that decision in my analysis.

B. For the employer

[21] Essentially, the employer had two arguments to object to the anonymization request, which are its premature nature and, above all, the strong presumption in favour of open courts that the Supreme Court has affirmed so often, including in *Sherman*. According to the employer, a confidentiality order remains exceptional.

[22] The employer argued that it is premature to request anonymization as the nature of the evidence to be disclosed is not yet known. The grievor spoke only in general terms about the evidence that would justify anonymization, but without more detail or clarification, it is too early to state that that information merits granting anonymity with respect to the decision and the file.

[23] The employer stressed the public nature of judicial and quasi-judicial proceedings, which is protected by the constitutional right to freedom of expression. In particular, it cited the following from *Sherman*:

> …
>
> *[2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.*

…

IV. Analysis

[24] To start, I reject the employer's first argument, but I accept the second. I agree with the grievor that to be effective, an anonymization request must be made at the beginning of the proceedings.

[25] I do not agree with the employer that the motion cannot be decided because the grievor spoke only in general terms about the evidence that would justify the anonymization. Without knowing the evidence that will be before me, I can still envisage the kind of evidence that either party could present.

[26] For the grievor's part, it is a matter of establishing that she was a victim of discrimination and that the employer's actions were not justified. For the employer's part, it is a matter of demonstrating that its conduct was not discriminatory within the meaning of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[27] However, I believe that the employer was correct when it spoke of the strong presumption in favour of open courts. As the Supreme Court reiterated in all the recent landmark decisions (*Dagenais*, *Mentuck*, *Sierra Club*, and *Sherman*), it is a fundamental constitutional principle. It began *Sherman* with the following statement:

…

> *[1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.*

…

[28] Considering again the three-part test in *Sherman*, I believe that the motion fails the second and third parts.

[29] I have no doubt that dignity is an important public interest that must be safeguarded. However, dignity and privacy must be distinguished, as taught in

Sherman. I believe that disclosing the diagnosis and the effects of the work-related injury on the grievor's privacy would violate her dignity.

[30] However, I believe that options are available that infringe less on the open court principle than anonymization to preserve sensitive information that would violate dignity if disclosed. The Board has often granted confidentiality orders for sensitive information (see *McCarthy v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 45 at paras. 77 to 79; and *Ross v. Public Service Alliance of Canada*, 2017 FPSLREB 13 at paras. 2 to 12). It is also possible to draft the decision in a way that protects sensitive information (see *Rahmani v. Deputy Head (Department of Transport)*, 2016 FPSLREB 10 at para. 44).

[31] A distinction must be made between an important public interest and the serious risk of it being breached, as the Supreme Court explained in the following passage from *Sherman*:

> …
>
> *[42] … In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.*
>
> …

[32] In this case, I believe that the grievor did not meet her burden of demonstrating that the order being sought is necessary as the risk is mitigated by two main factors: the nature of the evidence necessary to support the parties' arguments, and the possibility of protecting, at times, certain documents that may be sensitive.

[33] The hearing would essentially be about the alleged inadequacy of the employer's actions taken to meet the grievor's accommodation needs and the consequences for her employment situation. That is certainly related to some extent to her privacy but does not have the sensitive and fundamental nature of what is desired to be kept confidential. To fulfil its duty not to discriminate, the employer must be informed of

an employee's accommodation needs; as such, this information cannot be considered protected in this case.

[34] Therefore, the motion fails the third part: the negative impact of an anonymization order, as opposed to the transparency of the Board's work, outweighs its beneficial effect as the order is too broad a measure with respect to what must be protected.

[35] The grievor presented me with several decisions, in addition to those involving her before the other administrative tribunal, in which the style of cause was anonymized. In my view, all those decisions can be distinguished from this case.

[36] *Bragg Communications Inc.* involved the cyberbullying of a 15-year-old girl. Her father, acting as her guardian, requested that the file be anonymized. The request was granted based on the vulnerability of children as recognized under Canadian law.

[37] In *Vallée*, the anonymization request was made as part of an action for damages and interest for serious psychological aftereffects that the plaintiff suffered due to sexual abuse while a minor.

[38] In *TUAC, Local 502*, the employer requested that the names of the company and of the employees who would testify as part of a grievance against harassment, including sexual harassment, not be published. The arbitrator did not grant the request to not publish the company's name, as the issue of its reputation was not a public interest, but granted the request to not publish the names of the employees called to testify. Given their nature, the facts could have breached the employees' privacy, and they were entitled to some protection.

[39] In *A.B.* (a mother and two daughters), anonymizing the plaintiffs' names was requested in the context of a judicial review application of a removal decision. The two girls were minors, and the mother was seropositive.

[40] In *Lamontagne*, the plaintiff was a victim of blackmail by the defendant, who demanded sexual favours from him if he did not want his homosexuality and fetishism revealed to all his Facebook contacts. The defendant had already revealed intimate details about the plaintiff to his family. According to the Court of Appeal, the plaintiff should not have been required to waive his right to privacy for recourse to the courts to stop the defendant's actions.

[41] Those decisions are distinguished from this case because a coherent analysis of the harm suffered by parties seeking anonymization is not possible without revealing much of the intimate details that are at the heart of their identities. In this case, the grievor asked me for anonymization to preserve her dignity, but it can be protected by other available options that infringe less on the principle of transparent proceedings before the Board, such as redacting or sealing the medical documents.

[42] In *N.L.*, the anonymization request was granted in the interest of legal consistency. In that case, the applicant was dismissed after making a guilty plea, the outcome of which was an absolute discharge. He requested anonymity for the decision and for the file that would be before the Board to challenge his termination. In that case, the employer did not object to the request, unlike in this case.

[43] The Board allowed the anonymization request on the grounds that naming the decision would cause a contradiction between it and the legal regime that the *Criminal Records Act* (R.S.C., 1985, c. C-47; *CRA*) created. That Act provides that the identity of a person who receives an absolute discharge may not be disclosed. The Board explained as follows the apparent contradiction between the *CRA* and the fact of disclosing the identity of the person challenging his termination before the Board:

> …
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> *[70] One of the purposes of that Act is to support certain convicted persons in their rehabilitation as law-abiding members of society (see s. 4.1(2) of the* CRA*). The CRA operates to remove from view records in a federal agency's custody that may reveal the fact of a conviction. That Act also prohibits the federal agency from communicating or revealing the existence of the conviction without the prior authorization of the Minister of Public Safety and Emergency Preparedness. In my view, this is a recognition that that aspect of the privacy of persons granted an absolute discharge deserves protection in the open-court context and has a clear public interest aspect (see* Sherman Estate*, at para. 32).*
>
> *[71] To disclose the grievor's identity with respect to his conviction and the charges that led to it, or to make that information publicly available, would be contrary to the important interests that that Act seeks to protect. In addition, as noted earlier in this decision, it is difficult for the Board to consider rendering a decision about grievances that would ignore the facts central to this case.*
>
> …

[44] This situation is not the same. To hear *N.L.*'s grievance against his termination, the Board had to examine the facts that he had been accused of and that he had pleaded guilty for. The anonymization set out in the *CRA* would have been contradicted. In this case, the anonymization that the other administrative tribunal offered would not be contradicted — the grievor did not establish that the details of that tribunal's decision must be examined at this stage. Thus, it is speculative to think that that anonymous decision and a Board decision that is not anonymous could be connected. I also note that no reasons were given for the other tribunal's anonymization of the decision.

[45] Once again, for the purposes of the hearing and the decision, if more sensitive documents about the grievor's medical condition must be considered, then certainly, a confidentiality order can be considered to protect them.

[46] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[47] The motion to anonymize the file and the decision's style of cause is denied.

November 23, 2022.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board